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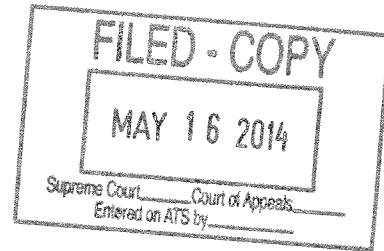
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IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM ALLEN OSER,)	
)	S.Ct. No. 41249
Petitioner-Appellant,)	D.Ct. No. 2013-06313
)	(Ada County)
vs.)	
)	BRIEF IN SUPPORT OF
STATE OF IDAHO,)	PETITION FOR REVIEW
)	
Respondent.)	
_____)	

COMES NOW Appellant William Oser, through counsel of record Deborah Whipple, pursuant to Idaho Appellate Rule 118, and offers this brief in support of his petition for review.

Review should be granted in the interests of justice because the Court of Appeals erred in determining that the district court properly summarily dismissed Mr. Oser's second successive petition for post-conviction relief.

History of the Case

Per *Oser v. State*, Docket No. 39001 (Ct. App. Sept. 5, 2012), the following occurred:

Oser was convicted of trafficking in methamphetamine or amphetamine, I.C. § 37-2732B(a), and delivery of a controlled substance, I.C. § 37-2732(a). He was sentenced to concurrent unified terms of twenty years, with minimum periods of confinement of six years. Oser appealed his judgment of conviction which was affirmed by this Court in an unpublished opinion. *State v. Oser*, Docket No.

35228 (Ct. App. Feb. 18, 2009). On July 20, 2009, Oser filed a pro se petition for post-conviction relief. Oser was appointed counsel to assist in his post-conviction action and counsel filed an amended petition for post-conviction relief. After hearing oral argument, the district court granted the state's motion for summary dismissal of Oser's petition on June 23, 2010. Oser appealed the dismissal, but later withdrew such appeal voluntarily. On May 16, 2011, Oser filed a successive petition for post-conviction relief and requested the appointment of counsel. The state moved for summary dismissal of the successive petition. The district court denied Oser's request for appointment of counsel and granted the state's motion.

Slip Op. p. 1.

The Court of Appeals stated that the successive petition alleged that initial post-conviction counsel had failed to adequately represent Mr. Oser in three respects: 1) failure to adequately address the issue of ineffective assistance of trial counsel on the basis of relevance, foundation, and admissibility of certain specific statements on a recording; 2) failure to raise the issue of trial counsel's failure to impeach the state's witnesses; and 3) failure to raise the issue of trial counsel's failure to call certain witnesses. The petition also raised a new claim that the affidavit of probable cause in support of the search warrant does not exist or that it was obtained as a result of police misconduct. Slip Op. p. 2.

The Court of Appeals found that the successive petition was untimely because Mr. Oser should have known of the ineffective assistance of original post-conviction counsel when the district court granted the state's motion for summary dismissal of his claims of ineffective assistance of trial counsel on June 23, 2010, but he did not file his successive petition until May 16, 2011. The Court held this was an unreasonable amount of time between discovery and the filing of the successive petition. *Id.* The Court further held that the new claim regarding the affidavit of probable cause was known or should have been known at least by the time the direct appeal ended on February 18, 2009. The Court noted that Mr. Oser did not assert any reason why

the claim was not raised in the initial petition and so it could not be raised in a successive petition. Slip Op. p. 3.

The Court of Appeals did not note in its opinion that Mr. Oser had filed his successive petition less than one month after he voluntarily withdrew the appeal from the summary dismissal of the original petition. R 40.

Mr. Oser filed the second successive petition at issue in this case on April 8, 2013, approximately seven months after the remittitur in the appeal from the first successive petition was issued. R 4.

The second successive petition raised the same claims as raised in the first successive petition. R 6. However, Mr. Oser supported this new petition with the affidavits of Eric Fredericksen and Erik Lehtinen. R 33-43.

Mr. Fredericksen attested that he had represented Mr. Oser in the direct appeal and in the appeal from the dismissal of the initial petition. Mr. Fredericksen further attested that he could not identify any meritorious issues in the appeal from the dismissal of the initial petition. He discussed the case with Mr. Oser and identified the deficiencies in the initial petition. He explained that to remedy the deficiencies and to raise additional issues that had not been presented, Mr. Oser would have to file a successive petition. He further advised Mr. Oser that to be considered timely the successive petition would have to be filed within a reasonable time of the conclusion of his appeal. Mr. Fredericksen lastly attested that in January 2011, SAPD moved to withdraw from the appeal of the successive petition and advised Mr. Oser that if he proceeded with the appeal, he could be subject to sanctions. In April of 2011, Mr. Oser voluntarily dismissed the appeal. R 36-37.

Mr. Lehtinen attested that as Chief of the Appellate Unit, he was familiar with Mr. Oser's appeals. He attested that in his opinion, Mr. Fredericksen's explanation to Mr. Oser regarding his cases was correct. He further attested that Mr. Fredericksen represented Mr. Oser in the appeal from the summary dismissal of the successive petition and that Mr. Lehtinen was surprised that the Court of Appeals in the successive petition appeal had measured the time period for the "reasonable time" analysis from the date that the original petition was summarily dismissed instead of the date that the original post-conviction appeal was terminated pursuant to Mr. Oser's motion for voluntary dismissal. R 39-43. Mr. Lehtinen concluded:

If Mr. Oser is ultimately deprived of the opportunity to obtain post-conviction relief simply because he chose to conserve the State's resources by dismissing a frivolous appeal in favor of raising his claims through a more appropriate vehicle—a successive petition—from this point forward, SAPD attorneys will be in the position of having to advise clients to proceed with their frivolous post-conviction appeals *pro se* (after SAPD withdraws), simply to obtain the benefit of the rule set forth in *Hernandez [v. State]*, 133 Idaho 794, 799 (Ct. App. 1999)]. In my opinion, this would not only be a tragic waste of resources, but it would leave SAPD attorneys in the uncomfortable position of having to choose between the duty of zealous representation, *see e.g.*, I.R.C.P. Preamble cmt. 2, and the duty to not waste the court's resources, *see e.g.*, ABA Standard 408.3(b), *supra*.

R 43.

The State filed an answer raising among other defenses that Mr. Oser's second successive petition was untimely. R 53-58.

The district court then entered an order denying appointment of counsel and a notice of its intent to dismiss. R 59-63.

Following the Court's notice, the State filed a motion for summary dismissal arguing that the ineffective assistance of counsel claims fail to raise a genuine issue of material fact and that the newly discovered evidence claim fails to meet the criteria of ICR 34, Idaho Code § 19-2406,

and the test of *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976). The State further argued that the *Brady* claim fails to meet the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). R 121-123.

The State accompanied its motion with a brief, which argued not the grounds set out in its motion, but rather that the petition should be summarily dismissed because it was untimely. R 123-131.

The district court then appointed counsel for the limited purpose of addressing the timeliness issue. R 135.

A hearing was held, and Mr. Oser's counsel argued that the affidavits of SAPD counsel established a reason for the late filing of the successive petitions - essentially that Mr. Oser filed his first successive petition within days of the dismissal of the appeal from the summary dismissal of the original petition¹ and that this filing was in accord with the advice given by SAPD. Counsel argued that the erroneous advice of SAPD that the successive petition must be filed within a reasonable time of the conclusion of the appeal from the summary dismissal of the original petition rather than within a reasonable time of the district court's summary dismissal of the petition, provided a reason for the late filing and a reason to find the current petition timely. Tr. p. 9, ln. 13-p. 13, ln. 25.

The district court took judicial notice of the underlying file in the first petition and then summarily dismissed Mr. Oser's second successive petition as untimely. Tr. p. 15, ln. 1-21; R

¹ As noted above, the record appears to support the conclusion that the first successive petition was filed within a month of the withdrawal of the appeal from the summary dismissal of the original petition. Counsel on the second successive petition stated that the first successive petition was filed two days before the withdrawal of the appeal of the dismissal of the original petition. Tr. p. 9, ln. 20-22.

A final judgment was entered, and this appeal timely followed. R 141-145.

Decision in the Court of Appeals

Mr. Oser raised the following issue on appeal:

Did the district court err in summarily dismissing the second successive petition for post-conviction relief on the basis that it was untimely given that the petition raised a genuine issue of material fact as to whether there was reason to allow a successive petition filed outside of the one-year limitation period? I.C. § 19-4908.

The Court of Appeals denied relief in an unpublished decision filed April 15, 2014. A copy of the Court's decision is attached.

The Court held that Mr. Oser's second successive petition was not filed within a reasonable time after discovering the claims raised in the petition.

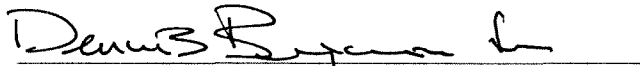
Reason Why Review Should Be Granted

Review should be granted in the interests of justice. For all the reasons set out in Mr. Oser's Opening and Reply Briefs, incorporated in full herein, the district court erred in summarily dismissing his petition. He asks that this Court now provide relief from that error.

Conclusion

For all the reasons already set out in Mr. Oser's briefs in this case, he asks that this Court grant review and reverse the order of summary dismissal.

Respectfully submitted this 16th day of May, 2014.


Deborah Whipple
Attorney for William Oser

CERTIFICATE OF SERVICE

I CERTIFY that on May 16, 2014, I caused a true and correct copy of the foregoing document to be:

☒ mailed

☐ hand delivered

☐ faxed

to: Kenneth Jorgensen
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010


Deborah Whipple